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No. 677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

JAMES WALDO McCORMICK,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States:

The petitioner, James Waldo McCormick, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on December 13, 1961, and is not reported, but appears in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of this record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on the 12th day of October, 1962, and was subsequently modified on November 19th, 1962. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on the 12th day of October, 1962. On November 19th, 1962 it was ordered that the petition for rehearing be denied and that the opinion be in other respects amended. (These orders appear in the appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Can false information from unnamed informants be used as the basis for a "positive" or "night" search warrant?

2. Does this Court's opinion in *Jones* v. *United States* (362 U.S. 257) permit the use of false hearsay evidence, as long as the affiant believed the information given him was true when he made the affidavit for the search warrant?

3. Can objects which are not named on a search warrant, and are neither contraband nor constitute evidence of a federal crime, and which are not seized as an incident to arrest but by virtue of the authority of

the search warrant, and which said objects at best might themselves constitute evidence of a state violation, be seized under a federal search warrant?

4. Must the proviso clause of 15 U.S.C. 1172 be alleged and proved in accordance with the allegations of the indictment to support conviction?

5. Does the burden of proof shift to the defendant in cases where the operation of a criminal statute turns upon a "proviso" clause included in the statute and pleaded by the government in the indictment as an allegation of fact?

6. Must the government affirmatively prove the non-existence of a state (or subdivision of a state) statutory exemption to the provisions of 15 U.S.C. 1172, where the indictment alleged there was no State statutory exemption in effect at the time of the offenses charged?

7. Despite the issue in the trial court as to whether the government or the defendant had the burden of proof as to a statutory exemption, and which issue was resolved to shift the burden to the defendant, was the petitioner denied due process when the Court of Appeals refused to decide the issue as raised below, and made a *de novo* decision, based upon its claim of judicial notice which was not exercised in the District Court?

STATEMENT OF THE CASE

A two-count indictment, No. 61 CR 312, was returned against the defendants, James Waldo McCormick and Jonn Earl Wilson, on May 16, 1961. The first count charged the defendants, James Waldo McCormick and John Earl Wilson, together with a co-conspirator, not a defendant (James Bernard Sutton), with conspiring

to violate Section 1172, Title 15, United States Code. The second count charged the said defendants with a violation of Section 1172, Title 15, United States Code.

The cause was tried before the Trial Judge, sitting without a jury, a jury trial having been waived. During the course of the trial, the defendants moved to suppress evidence secured by a search warrant and, after hearing, the motion was denied. Both defendants moved for acquittal at the close of the government's evidence, and offered evidence in their own behalf. The motion for judgment of acquittal was denied at the close of all evidence.

The defendants were convicted in the Court below, and James Waldo McCormick was sentenced to a term of eighteen (18) months in the custody of the Attorney General, and the defendant, John Earl Wilson, was sentenced to a term of six (6) months in the custody of the Attorney General.

The petitioner, James Waldo McCormick, appealed his conviction to the United States Court of Appeals for the Seventh Circuit. The defendant, John Earl Wilson, did not appeal.

The errors relied upon relate to the denial of the motion to suppress, and the failure of proof to sustain the allegations of either count of the indictment as to the defendant, James Waldo McCormick.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and denied the defendant's (James Waldo McCormick's) petition for rehearing. (As stated, the defendant, John Earl Wilson, did not appeal and is not a party to this petition.)

STATEMENT OF FACTS

In this petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, it is respectfully suggested that no useful purpose would be served by any long recitation of the facts in this case. They are set forth in detail in the opinion of the United States Court of Appeals for the Seventh Circuit. Petitioner now abandons the question of the sufficiency of the evidence of transportation for the purpose of this petition.

Generally speaking, however, the petitioner has been engaged in the slot machine business in Chambersburg, Pennsylvania since 1932. John Wilson, the co-defendant, has been engaged in the business of repairing and reconditioning slot machines at Chicago, Illinois for thirty-three years, and did business under the name of John's Novelty Company (A. 57). James B. Sutton, an unindicted co-conspirator, was employed by Wilson in the year 1957, which employment continued until the end of 1959, principally in connection with the assembly of slot machine cabinets (App. 19). Mr. Sutton testified on behalf of the government. His testimony related to a series of transportation of slot machines from Chicago, Illinois to Chambersburg, Pennsylvania, and the traveling to and from these points by Wilson and Sutton for the purpose of repairing slot machines. All of these transportations were made the subject of Count I, which alleged a conspiracy to violate Title 15, Section 1172, United States Code.

On the occasion of Wilson and Sutton's last visit to the petitioner, a slot machine was brought back to Chicago, Illinois from Chambersburg, Pa. for reconditioning, and it was this slot machine which was made the subject of a specific transportation in Count II of the indictment.

The petitioner respectfully submits the following brief fact résumé surrounding the issuance and execution of the search warrant which was the subject of the motion to suppress.

AFFIDAVIT FOR SEARCH WARRANT.

The affidavit for the search warrant contains, is as follows:

• • •

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Affiant received information from Chicago Office of the F.B.I. that F.B.I. Agents were present when the above slot machine was shipped via Railway Express *and placed proper identification upon said machine and package*, and that F.B.I. Agents were present at Hagerstown, Maryland on September 14, 1959, and *observed receipt of said slot machine in its container* at the Railway Express Office at Hagerstown, Md., and observed James W. McCormick placing said container in the trunk of his automobile and transporting it to Chambersburg, Pa., where he placed it within above described premises."

/s/ Richard H. Grabham
Special Agent, F.B.I."
(Emphasis supplied.)

FURTHER STATEMENT OF FACTS.

The evidence disclosed that on August 13, 1959, approximately one month before the shipment of the machine named in Count Two of the indictment, Mr. William Webb, an agent of the Federal Bureau of Investigation, marked the casting of the machine (App. 23). He had been called to John's Novelty Shop by the co-conspirator, Sutton, examined the machine, and initialled the bottom of the casting. About one month later, Sutton called Webb and arranged to meet him in the vicinity of Roosevelt Road, on Canal Street, in Chicago, Illinois,

outside of the Railway Express depot. Sutton pointed to a cardboard carton in the rear of the station wagon. (Gov't. App. p. 11-12) There is no evidence that Agent Webb, or any other F. B. I. agent, ever saw the contents of the carton. Thereupon, Sutton departed with the carton in his possession and left the observation of the agent. He returned a short time later and showed the agent a collect receipt of the Railway Express Agency.

Mr. Richard H. Grabham, a special agent of the Federal Bureau of Investigation, assigned to the Philadelphia office, saw the cardboard carton in Hagerstown, Maryland a few days later, saw McCormick pick it up, and place it in the rear of his automobile, and observed him drive to Chambersburg, Pennsylvania. The carton was not opened until the petitioner did so at the warehouse. (App. 59) Mr. Grabham also testified that McCormick was seen carrying the cardboard carton into a warehouse (App. 44-45). He had no personal knowledge of the contents of the carton, nor, for that matter, had any other agent of the F.B.I. (App. 43).

The same day on which Agent Grabham observed the activities of the petitioner, he appeared before the United States Commissioner, Edwin D. Strite, Jr., of Scranton, Pennsylvania, and secured a day or *night* search warrant to search the premises at 1721 Philadelphia Avenue, Chambersburg, Pennsylvania, on his affidavit, which stated that he was *positive* that the said Mills QT machine was concealed in a cardboard carton on the premises. (App. 30-3) The pertinent part of the affidavit has heretofore been set forth in this petition.

After the search warrant was issued, at 7:45 P.M., when it was night (App. 36), Agent Grabham proceeded to the petitioner's warehouse which was located approxi-

mately 100 feet behind McCormick's residence (App. 38). After entry, petitioner McCormick pointed out to Agent Grabham the Mills QT machine described in the search warrant, which was sitting on a bench (App. 30). This was the first time that Agent Grabham had any personal knowledge of the contents of the cardboard carton (App. 44). No one from the "Chicago office of the F.B.I." saw the carton open; no one saw the QT machine removed therefrom or packed therein; no one testified to personal knowledge that the QT machine was in the carton. Two other slot machines were located below the bench, and at the end of the warehouse, there were approximately fifteen (15) other machines. Pursuant to the authority of the search warrant for one QT machine, Agent Grabham confiscated all the machines he found, and inventoried said machines upon the return as being "property taken pursuant to the warrant". This makes a total of eighteen (18) machines. No property was taken incident to the arrest of the petitioner.

On the trial, no attempt was made to identify two of them and sixteen (16) were marked for identification, only nine (9) of which were testified about during the trial. At the time of the seizure, the witness and the affiant had no description of the machines seized, other than the QT machine. Agent Grabham knew that the mere possession of a slot machine was not a violation of federal law (App. 40-41); that there was no federal law making the possession of a slot machine a crime in Pennsylvania, or in any other State; and that, to his knowledge, there was no federal law being violated by the possession of the slot machines at the time Agent Grabham made the seizure (App. 40-41). No effort was made to turn the machines over to State authorities. On the trial the petitioner made a motion to suppress

which the Court in its discretion permitt as being timely under the circumstances. After he ..g, which raised the sufficiency of the affidavit and the seizure of machines other than the one named in the warrant, the trial court denied the motion. These matters were fully argued on appeal. Affirmance followed.

The petitioner will next deal with the statement of facts on such matters as are necessary for this Court's determination of the issues raised by the pleadings and the terms of the statute.

The statute and the indictment are as follows:

THE STATUTE

§ 1172. Transportation of gambling devices as unlawful; exceptions; authority of Federal Trade Commission.

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.*

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act. Jan. 2, 1951, c. 1194, § 2, 64 Stat. 1134 (Emphasis supplied).

THE INDICTMENT

The May 1961 Grand Jury charges:

That commencing on or about January 1958, the exact date to the Grand Jurors unknown, and continuing thereafter until on or about September 16, 1959, James Waldo McCormick and John Earl Wilson, defendants herein, and hereinafter referred to as "defendants", did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with James Bernard Sutton, co-conspirator, but not a co-defendant, and with divers other persons whose true names are to the Grand Jurors unknown, to commit certain offenses against the United States, in violation of the provisions of Section 1172 of Title 15, United States Code, making it unlawful to knowingly transport any gambling device to any place in a state from any place outside of such state, *provided that Section 1172, Title 15, United States Code, shall not apply to transportation of any gambling* device to a place in any state which has enacted a law providing for the exemption of such state from the provisions of Section 1172, Title 15, United States Code, or to a place in any subdivision of a state, if the state in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of Section 1172, Title 15, United States Code.

That is to say, the defendants did so conspire, confederate and agree with each other and with James Bernard Sutton that they would knowingly, willfully and unlawfully transport and cause to be transported from Chicago, Illinois, in the Northern District of Illinois, Eastern Division, to Chambersburg, Pennsylvania, and to Hagerstown, Maryland, certain gambling devices, sometimes referred to as slot machines, *which said State of*

Pennsylvania had not then enacted or had in effect any law providing for the exemption of said State, or the exemption of the City of Chambersburg in said State from the provisions of Section 1172, Title 15, United States Code, and which said State of Maryland had not then enacted or had in effect any law providing for the exemption of said State of Maryland, or the exemption of the City of Hagerstown in said State of Maryland from the provisions of Section 1172, Title 15, United States Code. (Emphasis supplied)

That to effect the objects of the conspiracy and during the existence of said conspiracy, one or more of the co-conspirators, at the time and place hereinafter set forth, did the following overt acts in furtherance thereof:

OVERT ACTS

1. That on or about June 10, 1959, James Bernard Sutton transported approximately ten (10) gambling devices from Chicago, Illinois, to Chambersburg, Pennsylvania.

2. That on or about August 4, 1959, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, James Bernard Sutton loaded fourteen (14) gambling devices, sometimes referred to as slot machines, in a station wagon, and drove said station wagon and machines from Chicago, Illinois, to Chambersburg, Pennsylvania.

3. That on or about August 6, 1959, James Bernard Sutton delivered a sum of money to James Waldo McCormick in Chicago, Illinois, in the Northern District of Illinois, Eastern Division.

4. That on or about September 11, 1959, James Bernard Sutton delivered to Railway Express Agency, Inc., a

gambling device, to wit, a Mills QT Bell Slot Machine, in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, for shipment to Hagerstown, Maryland.

In violation of Section 1172, Title 15, United States Code, and Section 371, Title 18, United States Code.

COUNT TWO

The May 1961 Grand Jury further charges:

That on or about September 11, 1959, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, James Waldo McCormick and John Earl Wilson, defendants herein, did unlawfully, knowingly and willfully transport and cause to be transported from Chicago, Illinois, to Hagerstown, Maryland, a gambling device, to wit a Mills AQ Bell Slot Machine, Serial #21387, *and at the time of said transportation the State of Maryland had not then enacted or had in effect any law providing for the exemption of said State of Maryland, or the City of Hagerstown, from the provisions of Section 1172, Title 15, United States Code*; in violation of Section 1172, Title 15, United States Code, and Section 2, Title 18, United States Code. (Emphasis supplied)

A TRUE BILL:

/s/ Edward E. Holden
Foreman

/s/ James P. O'Brien
United States Attorney

RSA:mj

The indictment returned in this cause, which has heretofore been set forth (at pp. 10-12), states in part in both counts that the defendants transported slot machines

from Chicago, Illinois to Chambersburg, Pennsylvania and Hagerstown, Maryland and, at the time of said transportations, none of the states, or "subdivisions" had enacted an exemption, pursuant to the provisions of the statute, 15 U.S.C. 1172.

FURTHER STATEMENT OF FACTS.

On the trial of the cause, no evidence was adduced that the states, or "subdivisions" described in the indictment did not have in existence in the years 1958 and 1959 the limitation as set forth in the proviso of the statute and affirmatively pleaded in the indictment. On the trial, the government took the position bluntly and positively that "it is an affirmative defense that must be asserted by the defendant." (App. 50, 70-71)

The trial court took the position that, even though the provision was so incorporated in the language of the offense the ingredients of the offense could not be accurately and clearly described with the provision omitted, nonetheless, and despite the fact that the provision had been pleaded, there was no authority to require the government to prove what it had alleged. The predicate upon which the government based its argument was that the exception "was difficult of proof" (A. 76).

The government rested and the motion for judgment of acquittal which the defendant made on this point, as well as others, was overruled.

The petitioner, McCormick, testified, but did not offer any evidence on the existence or non-existence of said provisions in the state, county or municipal law. Conviction followed.

On appeal, for the first time, the government in its answering brief, as an adjunct to its principal argument that the defendant had the burden of proof and, even if pleaded, the language was surplusage, raised the propo-

sition that the Court of Appeals could take judicial notice of the laws of the State, County and City of Chambersburg, Pennsylvania, and the State, County and City of Hagerstown, Maryland.

In his reply brief, the petitioner, McCormick, protested the use of this new theory, which permitted a conviction on one basis and an affirmance on another, and contended that the shift of position now constituted a denial of due process, so far as the petitioner was concerned. Nevertheless, the Court of Appeals refused to decide the question of whether the government or the defendant had the burden of proof under this type of statute and these pleadings, and did decide it on the basis of judicial notice of both the laws of the States of Pennsylvania and Maryland.

The petitioner, in his application for rehearing, raised the question of denial of due process. The rehearing was denied.

REASONS FOR GRANTING WRIT

This Court should exercise its jurisdiction in this case for the following reasons:

I. The Court of Appeals has misconstrued this Court's decision in *Jones* v. *United States* (362 U.S. 257) in ignoring the effect of misrepresentation by an affiant to the United States Commissioner in an application for a search warrant (372 U.S. 257, at pp. 271-272).

II. The Court of Appeals has so interpreted this Court's opinion in *Jones* v. *United States* (362 U.S. 257) as to permit and encourage the unbridled use of inter-office communications between unnamed federal enforcement agents and their unnamed informers in securing night search warrants. This Court should exercise its jurisdiction to strike down, or otherwise limit, such a broad incursion into traditional, constitutional requirements for the lawful "knock on the door at midnight."

III. If *United States* v. *Marron*, 275 U.S. 192, 196, may be decisive, then the decision of the Court of Appeals below is in conflict with such decision of this Court.

IV. The Court of Appeals below, by affirming a conviction for a violation of law where the petitioner was denied due process of law by deprivation of his right to have the validity of his conviction appraised on consideration of the case as it was tried and the issues as they were determined in the trial court, has sanctioned so radical a departure from the accepted and usual course of judicial proceedings as to invoke the exercise of this Court's jurisdiction.

I.

The Court of Appeals for the Seventh Circuit stated in its opinion:

> "We refuse to hold that such information, when communicated in the course of official business by the agents among themselves, is excluded by the hearsay rule, so as to require the quashing of a search warrant issued upon the affidavit of one of the agents, setting forth his reliance upon such information. Our position is in harmony with the modern view, as to the use of hearsay evidence to support the issuance of a search warrant, announced in *Jones* v. *United States,* 362 U.S. 257, 271 (1960)."

Among the points made on the appeal below was that the affidavit contained *false statements.* The affiant said that "he received information that F.B.I. agents (unnamed) were present when the above slot machine was shipped via Railway Express, and placed proper identification on said machine and package." This is absolutely untrue and is in no way supported by the evidence. The only evidence of marking on the machine was a marking which occurred one month prior to the shipment of the machine. Under the terms of the affidavit, it would appear that the agent was present in Chicago, Illinois and marked the machine and package at the time it was turned over to Railway Express for shipment.

The next misstatement contained in the affidavit is that, "F.B.I. agents were present in Hagerstown, Maryland on September 14, 1959, and observed receipt of said slot machine in its container." No one could have possibly have seen that slot machine in its container. The best that can be said was that Agents observed *a* container being picked up by the petitioner. Equally true, the best that could be said on the shipping end was that the Agent observed a container being taken into an office.

In *Jones* v. *United States,* (362 U.S. 257, at 271-272) this Honorable Court stated as follows:

"Petitioner argues that the warrant was defective because Didone's informants were not produced, because his affidavit did not even state their names, and Didone did not undertake and swear to the results of his own independent investigation of the claims made by his informants. If the objections raised were that Didone had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant. Such a charge is not made. All we are asked to decide is whether the Commissioner acted properly, not whether Didone did. We have decided that as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone had personally made inquiries about an apartment, so long as there was a substantial basis for crediting the hearsay."

It is the petitioner's respectful submission that this Court did not mean to say that, whether facts be true or not, as long as the affiant, acting on such untruthful information from unnamed informants, believed the same to be true that the affidavit cannot be attacked. Or again, if the Commissioner, acting upon the misrepresentations in the affidavit, believed that probable cause existed, no person shall have recourse or remedy for the faulty affidavit. The petitioner suggests that this Court's decision in *Jones* v. *United States,* may be so broad, unless some line of demarcation is drawn, the Fourth Amendment will be reduced to something of historical significance. The danger of the decision of the *Jones* case is at once apparent, in view of what has happened in the case now before this Court. If an informant tells a falsehood to a police officer, and the police officer makes an affidavit, acting upon such falsehood, he may well be acting in good faith. The Commissioner, reading the affidavit, may well be acting in good faith. But will this

be sufficient to protect a person who complains that his rights were violated by this means? Where is the traditional concept in law that a person be held liable for misrepresentation made in an affidavit?

We think, too, that in the instant case the normal bounds or permissible limits of the *Jones* case were overstepped. In the *Jones* case, this Honorable Court held that hearsay evidence might form a sufficient basis for an affidavit based on "has reason to believe". In the case at bar, however, based on hearsay evidence, the affiant stated that he "*was positive*" that the machine was on the premises. Frankly, we cannot conceive how, under the circumstances, the Commissioner may have been justified in issuing the warrant. On the face of the affidavit, the Commissioner knows it is hearsay. But if the fact be that the affiant could not be positive under the evidence, is it to be accepted as law that the belief of the Commissioner, that the affidavit set forth a sufficient cause, will immunize the search warrant from attack? Taking it a step further, if the affiant believed what he had set forth to be true, will this immunize the search warrant from attack—and, is that done by this Court's endorsement of hearsay to support a search warrant?

It is petitioner's contention that the opinion of the Court of Appeals below would tend to negative any possibility of an attack upon the affidavit, so long as either the Commissioner or the affiant believed the information he received to be true. We respectfully ask this Court, in view of this case, to reconsider what was said in *Jones* v. *United States*, and place some limitation on the use of hearsay. The petitioner is of the opinion that this Court certainly never meant to endorse limitless hearsay. Of course, in the *Jones* case, there was no

attack made upon the truthfulness of Didone's affidavit, a fact noted in the opinion. That question was not reached because it was not raised. The issue now is squarely before this Court, and in two principal areas:

1. Under what circumstances may a false affidavit be attacked, if the Commissioner and affiant apparently act on good faith on hearsay testimony? and

2. Can hearsay testimony be the basis of an "is positive" or "night-time" warrant?

We suggest that the answer to the latter question is clearly "No." As to the former it is submitted that any attack on the truthfulness of the affidavit can certainly be made on a motion to suppress and, if it be shown that the affidavit contained false or untrue statements, it is the obligation of the trial court or the reviewing court, to sustain the motion to suppress. This is an important question, in view of this Court's holding in the *Jones* case, and particularly in view of the language in the opinion which implies that, under circumstances where the affidavit contained misrepresentations, a different result may have been reached.

For the above and foregoing reasons, we respectfully submit that this Court ought to exercise its jurisdiction, and grant certiorari in this cause.

II.

In the Seventh Circuit, prior to this Court's decision in *Jones* v. *United States*, the most recent rule pronounced by that Court on the question of the validity of a search warrant which was based on hearsay evidence, is to be found in *United States* v. *Pearce*, 275 F.2d 318 (1960). In that case, the trunk of an automobile owned by the defendants was searched by agents of the Federal

Bureau of Investigation, acting pursuant to a search warrant. The defendant, Pearce, and his co-defendant, Hadesman, filed a petition to quash the search warrant and to suppress the evidence. Upon a hearing in the trial court, the motion was overruled.

In the Court of Appeals, the issue was whether the search warrant was issued on an affidavit sufficient to establish probable cause.

That Court did not question that a hearing on the falsity was required. The chain of F.B.I. Agent communication was described by the Court at page 322.

> Thus, we have a situation when Agent Stoelting, contrary to what he alleged in his affidavit, received the information from his superior, Frank Stefanak, who received the information by telephone from Chester Chrissman of the Seattle office, who received it from John Pearce, whom the government under compulsion of a court order, named as the informer referred to in the affidavit.

The basic infirmity of the affidavit in the *Pearce* case was the untruth sworn to by the F.B.I. Agent. The Court of Appeals held that the affidavit was insufficient and that the evidence should have been suppressed.

On the basis of this Court's decision in *Jones* v. *U.S.*, the Court of Appeals has apparently decided that "anything goes" as long as the affiant believed it. No attention was paid in the opinion below to the untruthfulness of Agent Grabham's affidavit, although the point was vigorously briefed and argued. Your petitioner respectfully represents that this decision is more than "a chipping away at constitutional safeguards." It represents a big hole in the shield of the Fourth Amendment. This decision will open the gates for the Federal Bureau of Investigation

and their nameless and faceless informers. The next step is "gossip" as a basis for the issuance of a search warrant.

Petitioner respectfully prays that the Court exercise its jurisdiction to place some curb or limitation on this important question.

III.

In *United States* v. *Marron*, 275 U.S. 192, this Court stated

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

In the case at bar the search warrant named one specific machine, the Mills QT. In addition to this, 17 other machines were seized *under the authority of the search warrant*, as Agent Grabham testified (App. 35). None were seized incident to arrest. All machines were inventoried on the Search Warrant.

The Court of Appeals in its opinion disposed of this question as follows:

> "* * * he had probable cause to believe that these machines had been transported in interstate commerce and were therefore subject to seizure. They were subject to seizure when found incidentally to the search of the warehouse under the search warrant. *Harris* v. *United States*, 331 U.S. 145, 155 (1947) and *Taglavore* v. *U.S.*, 9 Cir., 291 F2 262."

Neither of the two cases cited by that Court have anything to do with what can be seized by virtue of the warrant. *Harris* concerned counterfeited draft cards

"patently a serious and continuing offense against the laws of the United States." *Taglovore* was a search and seizure incident to arrest.

In its opinion, the Court of Appeals has completely ignored the reach of *Marron* v. *United States*. The record is clear that these machines were seized under the authority of the search warrant. They had no right in the warehouse except by virtue of the warrant. The arrest of the petitioner occurred in his home. No search was made incident to arrest. The execution of the search warrant was separate from the arrest in point of time and place.

The opinion below is at complete variance with this Court's opinion in the *Marron* case and this Court is respectfully urged to exercise its jurisdiction to resolve a direct conflict between this Court and the Court of Appeals for the Seventh Circuit.

IV.

The last reason why this Court ought to exercise its jurisdiction is based upon the fact that the decision of the Court of Appeals below has sanctioned a departure from the accepted and usual course of proceedings by a lower Court. The departure involves the affirmance of a conviction which was based upon one theory of culpability in the trial court and another in the Court of Appeals.

Similar in nature to this Court's recent remonstrance against cryptic indictments which permit trial on one theory and affirmance on another (Cf. *Russell* v. *United States*, 82 S. Ct. 1038 and *Cole* v. *Arkansas*, 333 U.S. 196), the petitioner asserts that to permit the "closeted" use of judicial notice outside his presence, hearing and understanding is a absolute denial of the guarantees of the Sixth Amendment.

The petitioner has been sentenced to a term of 18 months in the custody of the Attorney General of the United States. So far as McCormick knows, *i.e.*, what he heard in the courtroom—when he went to meet his accusers under the charge made against him by the United States—nothing has been shown to support that charge. He has now been told through the anominity of a carefully printed written opinion, that his guilt rests on inferences from local cases and equivocal statutes of which he never heard and which his counsel-of-choice never had opportunity to refute.

The petitioner, through his counsel, is aware of the doctrine of judicial notice, the exceptional relief from proof of the charge, which, when invoked, creates a recognized departure from the burden imposed upon the accusor. But—if properly invoked—the accused has the opportunity of protest. Not here!

We submit the decision of the Court is clearly in error. Wigmore, 3rd Edition, IX, page 536, states:

> "Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must in point of form make a request for it. • • •
>
> (b) When the judge, pending a decision as to taking judicial notice, seeks information in order to assist him in reaching that decision, and a party cites in a brief or brings into court for that purpose certain sources of information, the party so providing them *should notify the opponent, in fairness,* so as to give him an opportunity of consulting the same sources or producing others." (Emphasis Ours)

In Moore's Federal Practice, 2nd Edition, Vol. 5, page 1345, under judicial notice, the following is said.

"Under the Thayer-Wigmore theory, which has been endorsed by such eminent jurists as Mr. Justice Cardozo and Judge Learned Hand, facts which a court may judicially notice do not for that reason become indisputable in the sense that they are not subject to rebuttal by evidence. And according to this view notice must be given to the party against whom the matter, claimed to be judicially noticeable, is to be used. Under the other theory, espoused by Professor Morgan, judicially noticeable matter may not be challenged by evidence; but recognizing the danger of the doctrine when so applied he offers the following safeguards, which are concurred in by the Model Code of Evidence of the American Institute. Professor Morgan states that (a) the doctrine shall not be applied unless the litigant against whom the judicially noticed matter is to be used is given notice and opportunity to be heard as to the propriety of taking judicial notice and the *exact content of the matter to be noticed* and that (b) the judge is bound to decline to take such notice if the matter is not clearly indisputable." (Emphasis Ours)

Moreover, the Court of Appeals' taking of judicial notice is not limited to what the law is in the States in question, or the subdivisions in question. In the case of Pennsylvania, the Court innovates a new theory of law by relying on inferences to be drawn from certain inapplicable state statutes and a decision of the state as to a determination of what the law in the State *probably* is. As to Maryland, it draws similar inferences, and goes beyond the inference stage. The Court makes the finding that the slot machines are gambling devices under Maryland law, without authority to support it. Thus, not only is this defendant found guilty under a theory under which he was not prosecuted, and upon proof never presented, he has been found guilty on the novel theory of adopting inferences from statutes and interpretations of statutes, which he never had an

opportunity to defend against. A defendant's right under the 6th Amendment to the United States Constitution to defend himself includes resistance to a unilateral legal interpretation. We therefore respectfully submit that the defendant has been deprived of due process of law in that the validity of his conviction has been affirmed by consideration of the case on a theory other than on what it was tried and other than as the issues were determined in the trial court, contrary to the Fifth Amendment to the Constitution to the United States and the supreme law of the land.

For the foregoing reason, the petitioner urges on this point that the Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceedings in the Court below.

CONCLUSION.

Wherefore, for the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. CALIHAN
and
ANNA R. LAVIN,
Attorneys for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13653 SEPTEMBER TERM, 1962 SEPTEMBER SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES WALDO MCCORMICK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 12, 1962

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James Waldo McCormick, defendant, has appealed from a judgment of the district court convicting him, following a trial by the court without a jury, of violation of 15 United States Code § 1172 and 18 United States Code § 371, as charged in two counts of an indictment. The court committed him for imprisonment.

Count II charged that defendant and John Earl Wilson unlawfully transported from Chicago, Illinois to Hagerstown, Maryland a gambling device, to-wit: A Mills AQ Bell slot machine, serial No. 21387, the state of Maryland not then having in effect any law providing for the exemption of that state or the city of Hagerstown from the pro-

visions of 15 United States Code § 1172; in violation of said section and 18 United States Code § 2.[1]

In count I, the same defendants were charged wth an unlawful conspiracy with each other and with James Bernard Sutton, to commit offenses in violation of said § 1172;[2] that is to say, that they conspired with each other and Sutton to unlawfully transport from Chicago, Illinois to Chambersburg, Pennsylvania, and to Hagerstown, Maryland, certain gambling devices, referred to as slot machines, as to which the state of Pennsylvania had not enacted any law providing for the exemption of said state or city of Chambersburg from the provisions of § 1172, and as to which the state of Maryland had not enacted any law for such exemption for said state or the city of Hagerstown; that, in furtherance of said conspiracy, the co-conspirators committed certain overt acts;[3] in violation of said § 1172.

---

[1] 18 U. S. C. A. § 2 classifies as a principal one who aids and abets the commission of an offense against the United States.

[2] Said § 1172 provides:

"It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

* * *

[3] 1. That on or about June 10, 1959, James Berhard Sutton transported approximately ten (10) gambling devices from Chicago, Illinois, to Chambersburg, Pennsylvania.

2. That on or about August 4, 1959, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, James Bernard Sutton loaded fourteen (14) gambling devices, sometimes referred to as slot machines, in a station wagon, and drove said station wagon and machines from Chicago, Illinois, to Chambersburg, Pennsylvania.

3. That on or about August 6, 1959, James Bernard Sutton delivered a sum of money to James Waldo McCormick in Chicago, Illinois, in the Northern District of Illinois, Eastern Division.

4. That on or about September 11, 1959, James Bernard Sutton delivered to Railway Express Agency, Inc., a gambling device, to wit, a Mills QT Bell Slot Machine, in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, for shipment to Hagerstown, Maryland.

In violation of Section 1172, Title 15, United States Code, and Section 371, Title 18, United States Code.

1. It is the position of defendant that the evidence will not sustain his conviction as to either count. He contends that the proof does not establish him a co-conspirator as alleged in count I, nor an aider and abettor as alleged in count II.

Evidence tending to establish the following facts appeared upon the trial of this case.

John Earl Wilson, his co-defendant, was engaged in the business of repairing and reconditioning slot machines at Chicago, Illinois for 33 years, and did business under the name of John's Novelty Company. According to Wilson, he and defendant had known each other for a number of years. James Sutton, the unindicted co-conspirator, was employed by Wilson in the year 1957, which employment continued until the end of 1959, principally in connection with the assembly of slot machine cabinets. Sutton testified on behalf of the government. In June, 1958, a letter was received by Wilson from defendant at John's Novelty Company, signed "WMC". This letter, containing "a pretty good order", was answered by Sutton at Wilson's direction whereby Wilson proposed a sale to McCormick of ten or twelve slot machines. This letter was sent to 1721 Philadelphia Avenue, Chambersburg, Pennsylvania.

Shortly thereafter, Wilson told Sutton they had "received an OK on the order." On July 10, 1958, Wilson, in the presence of Sutton, spoke on the telephone to McCormick at Chambersburg and said "We are on our way." These machines were placed in a station wagon and camouflaged by fishing equipment and a boat so as to give the appearance that the car's occupants were on a vacation. Wilson, having notified McCormick by phone, drove with Sutton from Chicago, Illinois to Chambersburg, Pennsylvania, where the slot machines were unloaded at McCormick's warehouse in back of his residence and payment in cash was made therefor. At that time, defendant pointed to some old machines on his garage floor and asked Wilson if he could put them in working order. Because they were unable to work on the machines for lack of proper tools, Wilson said that they would return later.

About September 20, 1958, Wilson and Sutton drove from Chicago to Chambersburg with 10 or 12 slot machines, which were unloaded in defendant's warehouse and

paid for by him. The next day they repaired all but 10 of the old machines, and these 10 they took to Chicago, completed their repairs in November, returned them to defendant at Chambersburg, and were paid in cash.

Sutton then brought from Chicago 18 more slot machines to defendant at Chambersburg, in late November or early December 1958. These machines had been worked on by Sutton and Wilson at the John's Novelty Company.

In March, 1959, Wilson proposed a sale to defendant of 10 slot machines and a few days later Wilson showed Sutton a check drawn on defendant's bank account for half the purchase price. This check was endorsed by Wilson and part of the proceeds was deposited in the account of John's Novelty Company and the remainder in that of Sutton at a Chicago bank.

About June 10, 1959, these 10 machines were transported by Sutton in an automobile from Chicago, Illinois to Chambersburg, where they were delivered to defendant, who paid some cash to Sutton. Defendant sent back 5 machines for trade-in and 5 for rebuilding and repair.

In July, 1959, defendant was contacted by Sutton on behalf of Wilson, who proposed a sale of 9 used Ace machines for $195 each. Defendant accepted and in the first week in August the 9 Ace machines were delivered to defendant with 5 other slot machines, at his home in Chambersburg, for which defendant paid in bills of $100 denomination. The next day defendant gave Sutton 5 trade-ins and a little QT machine to take back to Chicago for repair, directing that it be returned, when repaired, to R. L. Horne, Hagerstown, Maryland. On September 11, 1959 Sutton telephoned to defendant and told him the QT machine was on the way. He took it to the express office in Chicago and addressed it to Mr. Horne as directed. He mailed the express receipt via air mail to defendant. This machine was delivered to defendant by the Hagerstown express office, which took a receipt signed by defendant in the name of R. L. Horne.

In *Glasser* v. *United States*, 315 U.S. 60, 80, the court said:

> "• • • Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'"

To the same effect is *United States* v. *Randall*, 7 Cir., 164 F. 2d 284, 288 (1947).

While it has been said that a criminal conspiracy is rarely susceptible of direct and positive proof, it is well-settled that it may be established by circumstantial evidence. *Nava* v. *United States*, 8 Cir., 212 F. 2d 115, 121 (1954), cert. denied 348 U. S. 825. To the same effect is *Blumenthal* v. *United States*, 8 Cir., 88 F. 2d 522, 531 (1937).

We are convinced that the record contains evidence that defendant, as charged in count I, conspired with Wilson and Sutton to transport slot machines between Chicago, Illinois and Chambersburg, Pennsylvania and Hagerstown, Maryland. He was with them an active participant in an illegal operation.

2. As to count II, defendant contends that it was impossible for him to have participated in the alleged unlawful transportation from Chicago, Illinois to Hagerstown, Maryland, of the gambling device described as a Mills AQ Bell slot machine, serial No. 21387, because his knowledge of the proposed act came after the crime had resulted. It is urged that defendant's only act was picking up the machine at Hagerstown, Maryland, at the conclusion of the interstate transportation charged in the indictment, and that the offense, if any, had then *been* committed. However, as hereinbefore indicated, *ante* 4, in August 1959, defendant directed Sutton to return this machine to R. L. Horne, Hagerstown. Thereupon Sutton made shipment thereof by express to Horne, sent the express receipt to defendant by air mail and called defendant and said that the machine was on its way. The machine was delivered by the express office to defendant, who receipted therefor in the name of R. L. Horne.

The evidence shows that defendant actively participated in this venture and that it was he who caused the machine to be shipped in interstate commerce.

3. Defendant admits that the proof demonstrates that a Mills QT Bell slot machine was transported but insists that, inasmuch as count II charged transportation of a Mills AQ slot machine, there was a fatal variance.

Prior to the trial the government furnished a bill of particulars, on defendant's motion, stating:

"• • • The transportation of a gambling device, to wit, a Mills QT Bell Slot Machine referred to in one of the overt acts of Count One of this Indictment is the same transportation of a gambling device, namely a Mills QT Bell Slot Machine, charged in Count Two of this Indictment."

There is no evidence in the record that any machine bearing the letters AQ was ever manufactured. While the above-quoted language from the bill of particulars makes no reference to a Mills *AQ* Bell Slot Machine and therefore involves itself in some awkward obscurity, it is reasonably clear that its author was attempting to say that both counts of the indictment meant to refer to the same device and that was a Mills QT Bell Slot Machine.

Our inquiry is properly limited to "whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U. S. 78, 82. We hold that the variance in no way affected the substantial rights of defendant.

4. In seeking a reversal, defendant also contends that there was a complete failure of proof as to nonexistence of the exemption provisions charged in each count. He refers to the allegations in the indictment that the state of Pennsylvania had not enacted or had in effect any law providing for the exemption of said state or the exemption of the city of Chambersburg in said state from the provisions of Section 1172, Title 15, United States Code, and that the state of Maryland, as well as the city of Hagerstown, had enacted no such exemption. No evidence was adduced by either the government or the defendant as to the existence or non-existence of such legislative exemption. However, the government calls our attention to the fact, of which we take judicial notice, that the state of Pennsylvania then had in effect a statute making the possession of slot machines illegal.[4] In that state it has been held that this statute applied to slot machines stored in a barn. *Commonwealth* v. *Cancillieri*, 166 Pa. Super. 1, 70 A. 2d 669. In view of this statutory prohibition of slot machines, we believe that a reasonable inference may be

[4] 18 Pennsylvania Statutes, § 4603 provides:
"Whoever maintains any gambling device or apparatus, to win or gain money or other property of value, or aids, assists or permits others to do the same * * * is a common gambler, and guilty of a misdemeanor."

drawn that there was no law in effect in Pennsylvania providing for the exemption thereof in the state or any part thereof.[5] Nothing in the record before us conflicts with this inference.

As to the question as to whether the state of Maryland or the city of Hagerstown, Maryland, had enacted an exemption in favor of slot machines, we take judicial notice of the Annotated Code of Maryand (1957), article 27, § 237, *et seq.*, which in detailed language prohibits gambling devices. While it is true that §§ 247 *et seq.* grant exemptions to various bona fide fraternal, religious, patriotic, educational and charitable organizations in certain named counties, none of these exemptions applies to the use of slot machines by persons and at no place in Washington County, in which Hagerstown is located, mentioned except for bingo games.

We conclude that the transactions involving the machines sent to Chambersburg, Pennsylvania and Hagerstown, Maryland were not exempt from the operation of § 1172. Cf. *North Beach Amusement Company* v. *United States*, 240 F. 2d 729.

5. No motion was made before trial to quash the search warrant which had been issued and served in this case or to suppress the evidence seized thereby. During the trial of the case at bar, defendant moved to suppress the evidence seized by agent Grabham of the Federal Bureau of Investigation under such a warrant issued on September 14, 1959 by a United States commissioner.

In this warrant, the commissioner recited:

> "Affidavit having been made before me by Richard H. Grabham that he (is positive) that (on the premises known as) Warehouse behind premises at 1721 Philadelphia Avenue, Chambersburg, Pa. in the Middle District of Pennsylvania there is now being concealed certain property, namely Mills 'QT' slot machine, serial number, 21387, located on base of said machine, and contained in cardboard carton, with trademark 'Container Corporation of America', and addressed to R. L. Horn, 816 West Church Street, Hagerstown, Maryland, from H. R. Brown, 4401 North Dover Street, Chicago, Illinois, which is known to have been

[5] Cf. McKelvey v. United States, 260 U. S. 353, 356 (1922), and United States v. Sutter, 7 Cir., 160 F. 2d 754 (1947).

transported from via Railway Express from Chicago, Illinois to Hagerstown, Maryland, and from Hagerstown, Md. to Chambersburg, Pa. in McCormick's automobile, in violation of U. S. Code Title 15, Section 1172 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist."

The warrant then commanded a search pursuant thereto, which, according to the return executed by Grabham, was made at 7:45 P.M. on the date of issuance of the warrant.

Defendant contends that there was not probable cause for believing the existence of the grounds on which the warrant was issued, although he does not deny that Grabham in an affidavit stated that he was positive that

"* * * (on the premises known as) 1721 Philadelphia Ave., Chambersburg, in warehouse located at the rear of said premises in the Middle District of Pennsylvania, there is now being concealed certain property, namely Mills 'QT' slot machine, serial number, 21387, located on base of said machine and contained in cardboard carton, with trademark 'Container Corporation of America' and addressed to R. L. Horn, 816 West Church Street, Hagerstown, Maryland, from H. R. Brown, 4401 North Dover Street, Chicago, Illinois to Hagerstown, Maryland, and from Hagerstown, Maryland to Chambersburg, Pa. in McCormicks automobile, in violation of U. S. Code Title 15, Section 1172

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

'Affiant received information from Chicago Office of the F. B. I. that F. B. I. Agent's were present when the above slot machine was shipped via Railway Express and placed proper identification upon said machine and package, and that F. B. I. Agents were present at Hagerstown, Maryland on September 14, 1959, and observed receipt of said slot machine in its container at the Railway Express Office at Hagerstown, Md., and observed James W. McCormick placing said

> container in the trunk of his automobile and transporting it to Chambersburg, Pa., where he placed it within above described premises.' "

Defendant contends that the information relied on by Grabham is hearsay, relying on *Davis* v. *United States*, 5 Cir., 35 F. 2d 957 (1929) and *Siden* v. *United States*, 8 Cir., 9 F. 2d 241, 244 (1925).

When the application for the search warrant was made to the commissioner, Grabham's affidavit asserted in substance a series of acts involving agents of the Federal Bureau of Investigation in several geographic points in the United States. In the functioning of an organization such as the Federal Bureau of Investigation, it is reasonable to assume that its agents in one locality must rely upon information communicated to them by agents of the same organization operating in other localities in the performance of their official duties. We refuse to hold that such information, when communicated in the course of official business by the agents among themselves, is excluded by the hearsay rule, so as to require the quashing of a search warrant issued upon the affidavit of one of the agents setting forth his reliance upon such information Our position is in harmony with the modern view as to the use of hearsay evidence to support the issuance of a search warrant, announced in *Jones* v. *United States*, 362 U. S. 257, 271 (1960):

> "We conclude therefore that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay here that the Commissioner acted improperly. The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient. * * *"

Grabham's affidavit reveals that his information was such that he had a right to be positivo that the QT machine was located in defendant's warehouse, as he swore.

We are not now concerned with hearsay evidence offered on a trial of the issue of guilt. What we say is limited to

the court's hearing on defendant's motion to suppress the evidence seized on the warrant.

When the search was made, Grabham placed defendant under arrest and several other machines were found. Defendant contends that it was error to seize them. However, Grabham already had information that 14 slot machines had arrived from Chicago, and, under the circumstances, he had probable cause to believe that these machines had been transported in interstate commerce and were therefore subject to seizure. They were subject to seizure when found incidentally to the search of the warehouse under the search warrant. *Harris* v. *United States*, 331 U. S. 145, 155 (1947), and *Taglavore* v. *United States*, 9 Cir., 291 F. 2d 262, 265 (1961).

We hold that the search warrant was valid, the slot machines introduced in evidence were lawfully seized, and the motion to suppress was properly denied.

6. In concluding this opinion, we point out that the record discloses that defendant's notice of appeal is fatally defective in that the action of the district court which we are asked to review is limited in the notice to the following:

> "Concise Statement and Date of Judgment:
>
> Defendant, James Waldo McCormick, remanded to the custody of the Attorney General of the United States for a period of 18 months; defendant, John Earl Wilson, remanded to the custody of the Attorney General of the United States for a period of 6 months, on December 13, 1961."

None of the errors relied upon in defendant's briefs in this court relates to the matter of the punishment fixed by that court's judgment. The notice of appeal makes no reference to that part of the judgment in which he was *adjudged* "guilty as charged and convicted." However, for some reason, the government has not raised the question (which is apparent) and we have chosen to overlook it and completely review the conviction upon the contentions as set forth in defendant's briefs.

For the reasons which we have stated, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

November 19, 1962

Before

Hon. Elmer J. Schnackenberg

Hon. Win G. Knoch

Hon. Roger J. Kiley

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

No. 13653 vs.

JAMES WALDO MCCORMICK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The court having considered the petition for rehearing filed herein by James Waldo McCormick, defendant-appellant, and being fully advised in the premises, IT IS HEREBY ORDERED that said petition be and the same is hereby denied, and IT IS FURTHER ORDERED that the opinion of this court filed herein on October 12, 1962 is amended by striking from page 10 of the printed slip opinion the two paragraphs headed with the numeral "6."

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No. 677

In the Supreme Court of the United States

October Term, 1952

JAMES WALTER McCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE [illegible]

[illegible]

[illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 677

JAMES WALDO MCCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 309 F. 2d 367.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1962. A petition for rehearing was denied on November 19, 1962. By order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended to and including December 29, 1962. The petition for a writ of certiorari was filed on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion, made after conclusion of the testimony at the trial, to suppress evidence obtained under a search warrant was properly denied.

2. Whether the court of appeals properly took judicial notice of the laws of Maryland and Pennsylvania to determine whether they exempted petitioner from the provisions of 15 U.S.C. 1172, forbidding the interstate transportation of gambling devices.

STATUTE AND RULE INVOLVED

15 U.S.C. 1172 provides, in pertinent part:

> It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Rule 41, F.R. Crim. P., provides in pertinent part:

> (c) ISSUANCE AND CONTENTS. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge

or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds of probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

* * * * *

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that * * * (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued. * * * The judge shall receive evidence on any issue of fact

> necessary to the decision of the motion. * * * The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner and a codefendant were charged by a two-count indictment with conspiring to transport slot machines in interstate commerce and with the substantive offense of interstate transportation of a described slot machine, in violation of 15 U.S.C. 1172 (A. App. 1–12).[1] After waiving a jury, both defendants were tried by the United States District Court for the Northern District of Illinois and found guilty as charged. Petitioner was sentenced to imprisonment for a period of eighteen months and the codefendant to imprisonment for six months (A. App. 4). Petitioner alone appealed. His conviction was affirmed (Pet. 1a–10a).

Count 1 of the indictment charged that between January 1958 and September 16, 1959, petitioner and John Earl Wilson conspired with one another and with Bernard Sutton, a co-conspirator but not a co-defendant, to transport slot machines from Chicago, Illinois, to Chambersburg, Pennsylvania, and to Hagerstown, Maryland, which states and cities did not then have in effect laws exempting them from the provisions of 15 U.S.C. 1172 (A. App. 10–12).

---

[1] "A. App." refers to appellant's appendix in the court of appeals. "G. App." refers to the government appendix therein.

Count 2 of the indictment charged that on September 11, 1959, petitioner and codefendant Wilson transported and caused to be transported from Chicago, Illinois, to Hagerstown, Maryland, a described slot machine and that the State of Maryland did not then have in effect any law exempting that State or the City of Hagerstown, from the provisions of 15 U.S.C. 1172 (A. App. 12).

1. No motion to suppress evidence was filed before the trial, although petitioner's counsel stated, during the testimony of an F.B.I. agent, that he intended to file such a motion on the ground that the affidavit in support of the search warrant was based upon hearsay (A. App. 35–36). At the close of the government's evidence, petitioner moved for a judgment of acquittal on various grounds, none of which related to suppression of the evidence (A. App. 50–51). On November 13, 1961, the hearing of testimony was completed and the cause adjourned to December 13 for the court's finding and disposition (A. App. 3). On November 29, 1961, petitioner filed a petition to quash the search warrant and to suppress evidence (A. App. 3, 13–14) and a motion for judgment of acquittal (A. App. 3, 69). The motion was argued on December 13, 1961, but the petition to quash was not mentioned (A. App. 70–78). The trial court denied both the motion and the petition (A. App. 78).

The petition to quash the search warrant and to suppress evidence rested on the grounds (a) that the affidavit in support of the warrant did not state facts

sufficient to establish probable cause and was based upon hearsay, and (b) that the articles seized were not mentioned in the search warrant (A. App. 13–14). The affidavit of Richard H. Grabham, Special Agent, F.B.I., was as follows (A. App. 15–16):

> That he (is positive) that (on the premises known as) 1721 Philadelphia Ave., Chambersburg, in warehouse located at the rear of said premises in the Middle District of Pennsylvania, there is now being concealed certain property, namely Mills "QT" slot machine, serial number, 21387, located on base of said machine and contained in cardboard carton, with trademark "Container Corporation of America" and addressed to R. L. Horn, 816 West Church Street, Hagerstown, Maryland, from H. R. Brown, 4401 North Dover Street, Chicago, Illinois, to Hagerstown, Maryland, and from which are Hagerstown, Maryland, to Chambersburg, Pa., in McCormicks automobile, in violation of U.S. Code Title 15, Section 1172.
>
> And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> Affiant received information from Chicago Office of the F.B.I. that F.B.I. Agents were present when the above slot machine was shipped via Railway Express and placed proper identification upon said machine and package, and that F.B.I. Agents were present at Hagerstown, Maryland on September 14, 1959, and observed receipt of said slot machine in its container at the Railway Express Office at Hagerstown, Md., and observed James W. McCormick

placing said container in the trunk of his automobile and transporting it to Chambersburg, Pa., where he placed it within above described premises.

2. The evidence at trial may be summarized as follows:

James B. Sutton testified that from February 1957 until the end of 1959 he was employed by defendant John Wilson in the rebuilding of slot machines in Chicago, Illinois. In June 1958 Wilson received an order for machines from petitioner. On or about July 10, 1958, after a telephone call to James McCormick in Chambersburg, in which both Wilson and Sutton spoke to the party who identified himself as petitioner, they carried the machines (concealed under a boat on the top of a station wagon) to Chambersburg, and then unloaded them in a garage at the rear of the petitioner's home.

On four occasions between September 1958 and August 1959, Sutton (sometimes accompanied by Wilson) delivered more than 40 machines to petitioner; on two occasions he took machines back for repair (A. App. 21–22). At the time of the August 1959 delivery, petitioner gave Sutton five trade-ins and a little QT machine to take to Illinois for repair. Petitioner told Sutton to return the repaired machine to Mr. R. L. Horne, 816 Church Street, Hagerstown, Maryland (A. App. 22–23).

After Sutton's return to Illinois he received a visit from F.B.I. agent Webb. Thereafter, Webb marked the casting of the QT machine, identified as Govt. Exh. 15. On September 11, 1959, Sutton sent the

machine (which had been packed in Webb's presence) by Railway Express to the addressee previously named by Wilson in Chambersburg, mailed the receipt to petitioner, and called petitioner to tell him it was on the way (A. App. 23–24).

F.B.I. agent Grabham testified that at 7:45 p.m., September 14, 1959, he placed petitioner under arrest at his residence in Chambersburg and gave him a copy of the warrant to search the warehouse at the back of his house. Petitioner took Grabham and three other agents to the warehouse and pointed out the Mills QT slot machine described in the search warrant, which was on a bench. Two other slot machines were underneath the bench, and at the end of the warehouse there were fifteen other slot machines. After telling petitioner that he did not have to make a statement, Grabham asked him if he picked up the Mills QT machine in Hagerstown. Petitioner affirmed that he had, but denied having brought it to Chambersburg. Petitioner said that the other machines had not been imported from outside the State and were old machines which he had acquired before the Johnson-Preston Act was passed. Grabham took possession of the machines and brought petitioner before the United States Commissioner (A. App. 18, 30–31).

The next day, after Grabham told petitioner that he and other agents had followed petitioner from Hagerstown to Chambersburg, petitioner admitted that he drove the machine in the back of his car. He again denied that the other machines came from outside

the State, saying that they belonged to clubs in the vicinity.[2]

It was stipulated that the agent for the Railway Express Company at Hagerstown would testify that he delivered to petitioner the package marked Government's Exhibit 15a on September 14, 1959. Petitioner showed him the shipping receipt for the package and signed the name R. L. Horn, 816 Church Street, Hagerstown, Maryland. It was further stipulated that petitioner received the shipment on said date and brought it by automobile to a building located back of his home at 1721 Philadelphia Avenue, Chambersburg, Pennsylvania (A. App. 68–69).

ARGUMENT

1. The trial court properly denied petitioner's motion to suppress.

a. Petitioner made no attempt to comply with the requirement of Rule 41(e), F. R. Crim. P., that such a motion be made before trial "unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion." Throughout the two-year period between the return of the indictment and the trial of the case, the language of the affidavit and the nature of the property seized were fully known to petitioner. Yet, it was only toward the close of the

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[2] On rebuttal, a brother in law of Sutton testified that he accompanied Sutton and petitioner in the station wagon when they went to petitioner's home in July 1958 with slot machines and a boat on top of the car (A. App. 63–64). A check for $1,125, dated March 7, 1959, from petitioner to codefendant Wilson and endorsed by him was identified (A. App. 14–15, 21, Govt. Exh. 20).

government's brief presentation that petitioner expressed an intention to file a motion to suppress all the government exhibits on the ground that the affidavit was based on hearsay (*supra*, p. 5). The matter was not mentioned again during the trial nor evidence offered with respect to it. Two weeks later, petitioner filed his motion to suppress (A. App. 13–14), which was denied without comment or discussion (A. App. 69–78). It is quite possible that the trial court denied the motion on the ground that it was filed too late.

b. In any event, the motion to suppress was properly denied on the merits. The affidavit of agent Grabham established that he had been informed by the Chicago F.B.I. that agents had been present when the package containing the slot machine was shipped by American Express, that they had marked the package, and that other agents had seen petitioner pick up the package in Hagerstown and drive to his premises.[8] That the initial information as to the ship-

[8] Petitioner argues that the affidavit was false in stating that affiant "received information that F.B.I. agents were present when the above slot machine was shipped via Railway Express and placed proper identification on said machine and package" and that "F.B.I. agents were present in Hagerstown, Maryland, on September 14, 1959, and observed receipt of said slot machine in its container" (Pet. 16). The evidence was that agent Webb made a distinctive marking on this machine about a month before it was shipped and was personally present when it was crated and shipped via Railway Express. As to the second allegation, the affidavit was that affiant and other agents were present when the package bearing all the distinctive markings described by Webb arrived in Hagerstown, where petitioner picked it up (*supra*, pp. 6, 7). Complete grammati-

ment from Chicago might technically be hearsay does not determine the question of probable cause. *Jones* v. *United States*, 362 U.S. 257. Nor does the fact that this information originated in Chicago cast doubt on the affiant's statement that he was positive the machine was in petitioner's house, since it was confirmed by the observations of the agents who saw petitioner pick up the package, load it in his automobile, and drive it to his premises. Although a magistrate must reasonably conclude that the affidavit has sufficient basis in the circumstances alleged, he need not find that the officer already has legally admissible evidence which is so conclusive of guilt that there is no longer need for making the requested search. See, as to the requirements for such an affidavit, *Batten* v. *United States*, 188 F. 2d 75 (C.A. 5); *Jacobs* v. *United States*, 24 F. 2d 890 (C.A. D.C.); *Fry* v. *United States*, 9 F. 2d 38 (C.A. 9); *United States* v. *Daniels*, 10 F. R. D. 225 (D. N.J.); *United States* v. *Tolomeo*, 52 F. Supp. 737 (W.D. Pa.)

c. Petitioner also contends that the seizure of machines not described in the search warrant was invalid. Since the substantive count, based on the shipment of the QT machines described in the warrant, is alone sufficient to support the verdict, the contention has no significance. It is, in any event, without merit. Reliance is placed upon the officer's conclusory statement, on cross-examination, that he

---

exact accuracy in every detail will seldom be achieved in such matters. Here the language used was a substantially accurate and completely fair statement of the facts.

seized these machines by virtue of the search warrant (A. App. 35). The testimony shows, however, that petitioner had already been arrested before the machines were found. The officers were properly on the premises, making a valid arrest and seizure. In plain sight, visible without ransacking, rummaging, or indeed any search at all were a number of gambling machines which the officers had probable cause to believe had been transported in interstate commerce. The machines were also contraband under Pennsylvania law, 18 Pennsylvania Statutes, sec. 4603; *Commonwealth* v. *Cancillieri*, 166 Pa. Super. 1, 70 Atl. 2d 669. The seizure was therefore proper.

2. The court of appeals properly took notice of the laws of Pennsylvania and Maryland to determine whether they contained an exemption from federal law which should be recognized under the proviso of 15 U.S.C. 1172. It was early determined that, since the judicial power of the federal government extends to many cases arising under the laws of the various States, federal courts will take judicial notice of State law. *Owings* v. *Hull*, 9 Peters 607, 625. In a trial before the court without a jury, there would be no need to offer proof of nonexemption regardless of who had the burden of proof. The conclusion of the court of appeals that neither the law of Pennsylvania (18 Pennsylvania Statutes, sec. 4603; *Commonwealth* v. *Cancillieri*, 166 Pa. Super. 1, 70 Atl. 2d 669) nor the law of Maryland (27 Ann. Code of Maryland, sec. 237, *North Beach Amusement Company* v. *United States*, 240 F. 2d 729 (C.A. 4)) cre-

ates such an exemption is undoubtedly correct. Petitioner's contention that Maryland does not include slot machines within its definition of gambling devices overlooks 27 Ann. Code, sec. 244. Indeed, far from providing an exemption to 15 U.S.C. 1172, the statutes of these two States themselves contain prohibitions against the operation of slot machines (with certain exceptions in Maryland not here applicable).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 677

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OCTOBER TERM, 1962.

JAMES WALDO MC CORMICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO GOVERNMENT'S BRIEF IN OPPOSITION.

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REPLY BRIEF TO GOVERNMENT'S BRIEF IN OPPOSITION.

The brief for the United States in opposition to the Petition for Certiorari contains an error which the petitioner feels is necessary to bring to the Court's attention. At pages 9-10 of the brief in opposition, the government argues under paragraph 1-A that the petitioner made no attempt to comply with the requirement of Rule 41(e) of the Federal Rules of Criminal Procedure. Therefore, in addition to the main contention that the motion to suppress was properly denied on the merits, the government argues that there was some infirmity in the motion to suppress itself.

When the petitioner's attorney read the government's brief in opposition, he called paragraph 1-A to the attention of the United States Attorney's office for the Northern District of Illinois. As a result, they referred

the matter to the Department of Justice in Washington, D. C. and after telephonic communications, portions of the last four lines of paragraph 1-A were stricken. (Petitioner understands this correction was made on all copies of their brief filed with the Court.)

Petitioner, however, feels that this concession by the government does not go far enough toward erasing a possible erroneous impression which this Honorable Court may have on this point.

It is true that the motion to suppress was made when the case was called for trial. Counsel for the petitioner explained to the Court the reason for the delay, and the Court permitted the defendant to make the motion and in so doing exercised its discretion under Rule 41(e), which provides:

> "• • • but the court in its discretion may entertain the motion at the trial or hearing."

The government, of course, objected to the motion, but as indicated it was permitted. It was understood that, while the motion was made orally, opportunity would be given the defendant to reduce it to writing and subsequently file it.

In the printing of the appendix, on appeal to the Court of Appeals for the Seventh Circuit, the question of timeliness was never raised below nor made an issue and, consequently, this portion of the record of the trial proceedings was not transcribed.

Petitioner suggested to the government that the entire paragraph 1-A should be stricken from the brief in opposition, but the government indicated that it would only make the correction to the extent of portions of the last four lines. If there be any doubt in the Court's mind, peti-

tioner would ask leave to have that portion of the record transcribed and submitted to this Court.

One other matter is respectfully called to this Court's attention. That is, a statement by the government in its brief in opposition, at page 10, footnote 3. of its brief. In lines 8 to 10, the statement is made:

> "The evidence was that Agent Webb made a *distinctive marking* on this machine about a month before it was shipped and *was personally present when it was crated* and shipped via Railway Express." (Emphasis supplied.)

There is no proof whatsoever in the record that Agent Webb was personally present when the machine was crated. So far as Agent Webb knows, he had no personal knowledge of the contents of the crate. (See the Petition, pp. 6-7, and the Govt. Appendix, pp. 11-12.)

It is also stated in lines 12 to 13 of footnote 3 on page 10 of the government's brief in opposition that the "affidavit was that affiant and other agents were present when the package bearing all the *distinctive markings described by Webb* arrived in Hagerstown, etc." There is no such evidence in this record.

Respectfully submitted,

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